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IN THE  
Supreme Court of the United States

October Term, 1947.

No. 276

WILLIAM H. FREDRICK and NATHAN GILBERT,

*Petitioners,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

Petition for Writ of Certiorari to the United States  
Circuit Court of Appeals for the Ninth Judicial  
Circuit and Brief in Support Thereof.

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**Petition for Writ of Certiorari to the United States  
Circuit Court of Appeals for the Ninth Judicial  
Circuit.**

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*To the Honorable the Chief Justice and Associate Jus-  
tices of the Supreme Court of the United States:*

Your petitioners respectfully show:

**Summary of the Matter Involved.**

Petitioners were convicted on three counts of a criminal information charging violations of the Second War Powers Act of 1942 (50 U. S. C. A. §633). The offenses with which petitioners were charged and convicted were the unlawful and willful acquisition, possession and control of counterfeit and forged ration coupons purporting to be valid for the month of May 1945. Two of the counts covered ration points of the type used for meats,

fats, fish and cheese, and one of the counts covered ration points of the type used for sugar. The Ninth Circuit Court of Appeals affirmed the conviction of petitioners on all three counts. [Tr., Vol. III, p. 424.]

A detailed statement of the facts involved is set forth in the Statement of the Case contained in petitioners' brief, annexed hereto.

No question of the validity of the ration orders or of the Second War Powers Act were involved in the court below, nor are they raised here. The petitioners in the trial court, as well as in the Circuit Court of Appeals, questioned the sufficiency of the information, the sufficiency of the evidence presented in support of the charges, the sufficiency and legality of the instructions given by the trial court, the rulings of the trial court in refusing to strike testimony, refusal of the trial court to instruct verdicts in favor of the petitioners individually and collectively, the prejudicial conduct of the trial court, the action of the trial court in overruling the defendants' demurrer, motion to quash and bill of particulars.

**Statement Disclosing Basis Upon Which It Is Contended That This Court Has Jurisdiction to Review the Judgment in Question.**

The jurisdiction of this court is invoked under Section 240, Judicial Code, 28 U. S. C. A. §347. The jurisdiction of this court is invaded to review a judgment of the Ninth Circuit Court of Appeals affirming a judgment of conviction for violation of the Second War Powers Act of 1942 (50 U. S. C. A. §633).

Judgment was entered by the Circuit Court of Appeals on July 18, 1947. No application for rehearing has been filed.

### Questions Presented by This Petition.

(1) Where the information charges that the petitioners willfully and unlawfully acquired, possessed and controlled counterfeit and forged ration documents "purporting to be valid for the month of May 1945" and there is neither evidence nor instructions as to what documents are "valid for the month of May":

(a) Is the evidence sufficient to sustain every material element of the offense for which the petitioners were convicted, where the documents are not self-explanatory and there is no evidence as to whether the documents in evidence "purport to be valid for May 1945."

(b) Is the conviction contrary to law where the court failed to instruct the jury as to what ration documents "were valid for May 1945," so that the jury could determine whether the defendants are guilty of the offense charged?

(2) Where the evidence presented by the prosecution establishes that a third party, to-wit, a government witness, had the sole task of depositing ration documents, and that defendants had nothing to do therewith or with the collection or handling of ration documents, was in error to hold that the presence of these deposits in the bank in the name of the market owned and controlled by a partnership, of which the petitioners were two of the three partners, was evidence that might well be taken into consideration by the jury in connection with other evidence relating to the sale and purchase of ration docu-

ments, and further, whether the admission of said evidence at the trial was error?

(3) Where the evidence discloses that Petitioner Gilbert neither bought nor sold ration documents, but at best merely referred the purported sellers to Petitioner Fredrick, was the conviction of Petitioner Gilbert, as a principal or as an aider or abettor, error?

(4) Is an information duplicitous when it charges the crime of acquiring, possessing and controlling "counterfeit and *forged* ration coupons" without specifying whether it is intended to charge that the ration coupons are counterfeit or forged, or both?

(5) Where the information charges the crime of acquiring, possessing and controlling counterfeit and forged "ration coupons," must the prosecution prove that the coupons are both counterfeit and forged?

(6) Where the evidence discloses that sugar stamps and meat stamps formed part of one transaction, i. e., a single purchase, was it error to permit the prosecution to charge two offenses, one offense being the purchase of the sugar stamps and the other being the purchase of the meat stamps?

(7) Was it error to permit the amendment of the information by permitting the words "ration documents" to be substituted for "ration coupons," after the Government had virtually completed its case and where the defense was taken by surprise by the proposed amendment, without granting the defense a continuance in which to prepare a defense to the amended information?

### Reasons Relied on for the Allowance of the Writ.

Petitioners respectfully submit that in the trial of the court below they have been denied due process of law, contrary to the provisions of Amendment 5 to the Constitution of the United States, which deprivation is more specifically set forth in the following reasons relied on for the allowance of the writ:

(1) The information charged the illegal and unlawful acquisition, possession and control of certain specified ration coupons, to-wit, a certain quantity of ration coupons which "purported to be valid for May 1945." [Tr., Vol. I, pp. 14-17.] There was a complete failure of proof as to this point and the court completely failed to give any instructions as to what coupons were valid for the month of May 1945. Therefore, the crime charged was never proven, nor was the jury properly instructed to enable it to determine whether the crime charged was proven beyond a reasonable doubt.

(2) The Government's own witness established beyond a doubt that neither of the petitioners had any connection with depositing of ration currency. [Tr., Vol. II, pp. 27, 37-38.] As a result, it was error to permit any evidence to go to the jury as to what was in the bank deposits.

(3) The trial court and the Circuit Court of Appeals erred in holding Petitioner Gilbert guilty as a principal or as an aider or abettor, since there was a complete lack of evidence connecting him with any purchase or sale of ration currency.

(4 and 5) The terms "counterfeit" and "forged" are not synonymous and a "counterfeit" document is not the same as a "forged" document. In using the terms in

the disjunctive it indicates that the document is both counterfeit and forged.

(6) Where a large number of ration documents comprise one purchase and sale, the prosecution cannot constitute each document which forms a part of such purchase and sale as an element of a distinct offense. In other words, a purchase of 60,000 ration coupons in one transaction cannot be charged as 60,000 separate and distinct offenses. The court below erred in allowing the prosecution to charge the purchase of the meat stamps and sugar stamps as two offenses since the evidence discloses that they were the subject of a single transaction.

(7) The trial court should have given the defense a continuance in order to enable it to prepare a defense to the amended information, since the defense prepared was with relation to ration "coupons" and not to ration documents generally. A ration coupon is a distinct type of ration currency.

(8) The trial court's instructions to the jury were erroneous, and particularly with reference to the demand that the petitioners had the burden of explaining the presence of the counterfeit ration currency in the petitioners' bank account.

(9) In as much as the Government's own testimony proved that the petitioners could have had nothing to do with the deposit of ration currency, the trial court should have stricken any evidence as to the contents of petitioners' bank account or the deposits therein.

**Prayer for the Issuance of the Writ.**

Wherefore, petitioners pray that this court issue its writ of certiorari directed to the United States Circuit Court of Appeals for the Ninth Circuit commanding said court to certify and send to this court on a day certain, to be designated therein, a full and complete transcript of the record and all proceedings in the cause numbered and entitled in said court, "No. 11259, William H. Fredrick and Nathan Gilbert, Appellants, vs. United States of America, Appellee," to the end that said cause may be reviewed by this court as provided by law, that said judgment of said Circuit Court of Appeals be reversed and that your petitioners have such other and further relief in the premises as may seem just.

Dated: Los Angeles, California, August 14, 1947.

ABRAHAM GOTTFRIED,

*Counsel for Petitioners.*

**Certificate of Counsel.**

The foregoing petition for writ of certiorari, together with the hereinafter supporting brief, is well founded in point of fact and law, is presented in good faith and is not interposed for delay.

Dated: Los Angeles, California, August 14, 1947.

ABRAHAM GOTTFRIED,

*Counsel for Petitioners.*



IN THE  
**Supreme Court of the United States**

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October Term, 1947.

No. ....

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WILLIAM H. FREDRICK and NATHAN GILBERT,

*Petitioners,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

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**BRIEF IN SUPPORT OF PETITION FOR WRIT  
OF CERTIORARI.**

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**Statement.**

Jurisdiction is conferred by Section 240(a) of the  
Judicial Code, 28 U. S. C. A. 347.

The judgment of the United States District Court was  
entered on February 18, 1946. [Tr., Vol. I, pp. 38-39.]

The opinion of the Circuit Court of Appeals was rendered,  
filed and entered on July 18, 1947. [Tr., Vol. III,  
pp. 398-423.]

No petition for rehearing was filed.

### Statement of the Case.

On January 22, 1946, the petitioners were jointly charged, in a criminal information containing eleven counts, with violation of the Second War Powers Act of March, 1942 (50 U. S. C. A., Sec. 633). Six of the eleven counts alleged the unlawful and willful acquisition, possession and control of "counterfeit and forged ration coupons, purporting to represent . . . ration points of the type used for meats, fats, fish and cheese, and purporting to be valid for the month of May, 1945." Four counts charged illegal use of such coupons, and the eleventh count set forth that the petitioners had unlawfully acquired, possessed, and controlled counterfeit and forged ration coupons purporting to represent Stamp No. 36 of War Ration Book No. 4, "each purporting to be valid for five pounds of sugar for the month of May, 1945." [Tr., Vol. I, pp. 2-18.]

The petitioners filed a demurrer, a motion to quash, and a motion for a bill of particulars, each of which was denied. [Tr., Vol. I, pp. 19-24.]

At the trial the Respondent called as its witnesses Theodore Freeman, Alma E. Keevey, Harriett Welling, Max Jones, Allen Becker, and Thaddeus R. Loud. The substance of their testimony is as follows:

THEODORE FREEMAN testified that he was employed by the Hollywood Ranch Market; this market was owned by the Appellants and Lawrence Fredrick, a brother of William Fredrick, in partnership, operating also a second market named Bill's Ranch Market; that his position is that of office manager in charge of office routine and that he was the sole person who deposited ration coupons and wrote ration checks. He thereupon described the method

of handling the coupons in the market, which description showed that Petitioners did not handle the coupons in any manner from the time of collection to the time of deposit in the bank. [Tr., Vol. II, pp. 25-39.]

ALMA E. KEEVEY testified that she was employed by the Office of Price Administration in its Verification Center and that she had found approximately 11,400 counterfeit stamps in deposits for the Hollywood Ranch Market which arrived at the Verification Center; that the stamps were checked either by herself or under her supervision; that she based her opinion that the stamps were counterfeit on the instructions given her by employees of the Office of Price Administration. [Tr., Vol. II, pp. 40-82.]

HARRIETT WELLING testified that she was a teller at the Hollywood State Bank; that according to her recollection all deposits were made by Theodore Freeman on behalf of the Hollywood Ranch Market; that at the end of each day the ration deposits were locked in the safe and periodically they were mailed to the OPA Verification Center in San Francisco; that she was not always present at the teller's window; that she had an assistant who assisted her in her work; that a former employee of the bank had been convicted of stealing and selling ration stamps that had been deposited by customers of the bank; that she had turned over certain deposits of the Hollywood Ranch Market to OPA Investigator Thaddeus R. Loud; that other employees had access to the teller's cage where the ration deposits were kept until the end of the day. [Tr., Vol. II, pp. 82-133.]

MAX JONES had previously been convicted of a felony in connection with the sale of gasoline coupons and at the time of his testimony was in jail for that offense. He testified that he was told by Petitioner Gilbert that Gilbert was interested in buying red stamps and that he introduced Allen Becker to Petitioner Gilbert. He testified that he did not participate in any conversations and later stated that he may have been the one who first broached the subject to Petitioner Gilbert. He did not know whether any sales were made. While he stated that after the OPA had questioned Petitioners concerning ration stamps he went over to see Petitioner Fredrick, his testimony does not disclose that he actually ever spoke to him, and he further was unable to positively identify Petitioner Fredrick as the Fredrick that he had in mind. [Tr., Vol. II, pp. 133-155.]

ALLEN BECKER testified that he was introduced to Petitioner Gilbert by "Dick" Jones, who asked Petitioner Gilbert how many points he wanted; that he later received a package from a mysterious stranger and took the package which he believed contained 100,000 red points over to Mr. Gilbert in Burbank, who told him that he had better contact Petitioner Fredrick at the Hollywood Ranch Market; that he did see Petitioner Fredrick; that no sale was made but samples were left to be tested as to their validity; that thereafter he spoke to Petitioner Fredrick on several occasions and later was handed, by a mysterious stranger, a package of eleven envelopes supposedly containing 55,000 or 60,000 stamps, which he brought over and sold to Petitioner Fredrick who paid him \$600.00; that thereafter he delivered approximately forty envelopes allegedly containing 200,000

points and received \$2000.00 for them; that (upon being prodded by counsel for Respondent) he believed "at the same time that the red points were taken there, there was one envelope of sugar stamps" containing an unknown number. This witness testified that at no time did he make any sales to Petitioner Gilbert nor did he have any conversations with him, and that all transactions were with Petitioner Fredrick. This witness had been convicted for a misdemeanor in connection with the sale of counterfeit ration points. He further stated that he could not identify the man from whom he obtained the envelopes. *Moreover, he at no time positively stated that he ever examined the contents of the envelopes which he stated were sold to Petitioner Fredrick to determine what they contained.* [Tr., Vol. II, pp. 155-230.]

THADDEUS R. LOUD testified that he was an OPA employee and that he examined certain ration deposits of the Hollywood Ranch Market at the Hollywood State Bank; that he found 13,845 counterfeit stamps in the envelopes endorsed by the bank with the date "May 24," and 11,017 counterfeit stamps in the envelopes marked "May 18." This latter is represented by Exhibit 34. [Tr., Vol. II, pp. 230-251; 255-294.]

The Petitioners brought out from this witness that all the ration currency in the Exhibits 1 to 34, inclusive, consisted of ration *stamps* and not ration *coupons*. [Tr., Vol. II, pp. 269-273.]

After presenting its evidence, the Respondent moved to amend the information so as to substitute the words "ration documents" for the words "ration coupons" wherever the latter appeared in the information. Claiming surprise, the Petitioners objected, but the court be-

low permitted the Respondent to amend. [Tr., Vol. II, pp. 269-280.]

"In the interest of expediency," the Respondent voluntarily dismissed four counts. After the court had expressed the view that "the evidence is insufficient to tie these defendants into the depositing of any of the ration coupons," the Respondent dismissed four more counts. This left only Counts 9, 10, and 11 to be considered by the jury. [Tr., Vol. II, pp. 283-285.]

At the close of the Respondent's case, counsel for the Petitioners moved that these three counts be dismissed as to the Petitioner Gilbert. The Petitioners at the same time moved to strike the same three counts, presumably as to both Fredrick and Gilbert. Both motions were denied. [Tr., Vol. II, pp. 286-290.]

A motion was made to strike the testimony of ALMA E. KEEVEY and it was denied. [Tr., Vol. II, p. 290.] Motion was made to strike the testimony of HARRIETT WELLING and was denied. [Tr., Vol. II, p. 291.] Motion was made to strike the testimony of Witness JONES and was denied. [Tr., Vol. II, p. 292.] Motion was made to strike the testimony of Witness BECKER and was denied. [Tr., Vol. II, p. 292.] Motion was made to strike the testimony of Witness LOUD and was denied. [Tr., Vol. II, p. 293.]

Petitioners then called as their first witness DORIS GOODSON, who testified she was employed in the postoffice substation located in Bill's Ranch Market; that she knew Witness Jones for 4½ years; that she had a conversa-

tion with him about January or February 1945; that Jones asked her if she thought Appellant Gilbert would be interested in buying red stamps; that she suggested he should speak to Petitioner Gilbert direct; that he thereafter returned in ten or fifteen minutes and stated that Petitioner Gilbert was not interested; that she was familiar with the reputation of Witness Jones and that his reputation for truth, honesty and integrity was bad. [Tr., Vol. II, pp. 294-301.]

Petitioner FREDRICK took the stand and testified that he was one of three partners who owned the Hollywood Ranch Market and Bill's Ranch Market; that the markets did over two million dollars worth of business and they operated five departments in each store—meat department, grocery department, delicatessen department, fruit department and liquor department; that in the Burbank store they have three sub-tenants—being the post-office, five-and-ten, and a bakery; that they employ approximately 75 employees, of which the butcher shops have eleven regular employees and three extra employees; that each butcher department has its own manager who has complete managerial authority over the whole department; that the average employee turnover in the first half of 1945 ran 40% to 50%; that Petitioner Gilbert's duties were that of grocery buyer; that the third partner, Mr. Lawrence Fredrick, was in charge of the fruit department; that food subject to red points was sold in the meat department, grocery department and delicatessen, and sugar was sold in the grovery department; that each de-

partment collected the ration points which were deposited in boxes [Defendants' Exhibit C], or in jars in the meat department; that at least 50 employees handled ration points; that he at no time ever handled ration points; that it was not part of his duties to do so; that during the course of the year the stores handled approximately 90,000 stamps; that Mr. Freeman, the Office Manager, had general supervision of their ration stamps and their deposits, and was the only one who could sign ration checks; that Petitioner Fredrick could not sign ration checks; that Government witness Loud advised him, Petitioner Gilbert, and his brother Larry Fredrick, that unless they cooperated they would file a felony charge against them; that he advised Loud that they did not know how the counterfeit ration stamps got in their account and that he would cooperate in every way possible to try to track it down, even to the extent of employing OPA personnel; that prior to the trial he had never seen Government witness Jones; that Al Becker had attempted to sell him stamps in February or March of 1945 and that he had refused to purchase said stamps; that while he had seen him in the market two or three times thereafter, he had never had any other conversations with him; that he had purchased no stamps from him at any time; that he had never purchased sugar stamps from Becker or Jones, or from anyone; that as far as he knew Petitioner Gilbert never purchased any stamps from any person; that he always attempted to obey the rules and regulations of the OPA. [Tr., Vol. II, pp. 301-321.]

Petitioner GILBERT testified that he had been approached by Witness Jones who solicited the sale of red points and that he had told Witness Jones that he was not interested in purchasing the stamps; that Jones and Becker came in thereafter and that Jones had introduced Becker as a friend and asked Gilbert if he could supply Becker with some cigarettes; that he never told Becker or Jones to see Bill Fredrick; that he never purchased any points at any time from Becker or Jones, or anyone else, and that he only saw Becker on one occasion; that to his knowledge Petitioner Fredrick had never purchased any stamps; that he remembers that the OPA had made adjustments from time to time when points were needed. [Tr., Vol. II, pp. 323-328.]

Petitioner introduced five reputable and substantial business men who testified as to the Petitioners' good reputation, and it was thereafter stipulated that if certain named reputable business men had been called to testify they would have testified that the reputation of the Petitioners were good. [Tr., Vol. II, pp. 328-338.]

The jury returned a verdict of guilty as to both petitioners on all three counts, with a recommendation for leniency in favor of the Petitioner Gilbert. [Tr., Vol. I, p. 31.]

Thereafter on *February 21, 1946*, the petitioners appealed from the judgments of the trial court based upon that verdict to the Ninth Circuit Court of Appeals which, thereafter on July 18, 1947, affirmed the judgment, the opinion being filed on said date. [Tr., Vol. I, p. 44.]

## ARGUMENT.

### I.

**The Evidence Is Insufficient to Sustain Every Material Element of the Offenses for Which Petitioners Were Convicted and, Therefore, the Verdict Was Contrary to Law and the Facts.**

One of the elements of the offenses in the Information was proof that the alleged counterfeit and forged documents involved in Counts Nine, Ten and Eleven "purported to be valid for the month of May 1945." The court instructed the jury as follows [Tr., Vol. II, p. 379]:

"The Court: \* \* \*

You are further instructed that the prosecution must prove beyond a reasonable doubt that the counterfeit and forged ration coupons involved in Counts Nine, Ten and Eleven of the Information purported to be valid for the month of May, 1945, and if the prosecution should fail to prove that the said ration documents purported to be valid for the month of May, 1945, then you must find the defendants not guilty of the charges contained in the counts of the Information referred to. \* \* \*"

The only evidence introduced on this point was as follows [Tr., Vol. II, pp. 255-256]:

### "FURTHER DIRECT EXAMINATION

By Mr. Binns:

Q. Mr. Loud, can you tell the jury what sugar stamp was valid in May of 1945?

Mr. Gottfried: I object to that, if your Honor please, unless he can show how he knows.

The Court: He will be subject to cross-examination.

Mr. Gottfried: Exception.

The Court: Exception noted.

Mr. Binns: Q. You may answer. A. Sugar Stamp No. 36 was valid.

Q. And can you tell us what red meat rationing stamps were valid in May of 1945?

Mr. Gottfried: Same objection.

The Court: Have you the regulations here?

Mr. Binns: No, I do not happen to have the regulations that covered that, your Honor.

The Court: I shall have to ask you to produce the regulations and I will include them in my instructions to the jury.

Mr. Binns: I will do that. There will be no further questions. You may cross-examine."

No evidence of any kind was introduced with reference to the red stamps, the subject of Counts Nine and Ten, and it is respectfully submitted that the evidence of this witness with reference to the validity of sugar stamp No. 36 was insufficient since he was not properly qualified.

Nowhere in the instructions did the court advise the jury whether these stamps or any stamps were valid for the month of May and, in the absence of proof or an instruction as to the law, it is respectfully submitted that the verdict was contrary to the law and the facts and the evidence failed to sustain this element of the offense.

II.

**The Trial Court Erred in Denying Appellants' Request to Strike the Testimony of Witnesses Keevey, Welling and Loud, and the Government's Exhibits 1 to 34, Inclusive, and the Circuit Court of Appeals Erred in Affirming This Action in View of the Evidence.**

The testimony of Government witness Keevey was in substance that she was employed by the OPA Verification Center and that she or employees under her supervision had found allegedly counterfeit ration stamps in the envelopes containing the name of Hollywood Ranch Market and which were forwarded to the San Francisco Verification Center by the bank. [Tr., Vol. II, pp. 40-82.] This witness had no knowledge as to the person who deposited the stamps.

Government witness Welling testified that she was the teller in the Hollywood State Bank; that Theodore Freeman, an employee of the Hollywood Ranch Market, made out all the deposit slips and to the best of her knowledge made all the deposits of coupons for the Hollywood Ranch Market; and that she turned over a portion of the deposits to Government witness Loud. [Tr., Vol. II, pp. 82-132.] She also failed to connect the petitioners in any way with the allegedly counterfeit stamps.

Government witness Loud testified that he examined Government's Exhibit 34 in the Hollywood State Bank; that he found part of the stamps to be counterfeit. [Tr., Vol. II, pp. 230-251; 255-294.] This witness likewise

did not in any way connect the petitioners with the allegedly counterfeit coupons found in the bank deposits.

The testimony of these witnesses, as well as the Government's exhibits, all related to ration stamps which had been discovered in the deposits of the Hollywood State Bank after said deposits had been received by the bank, and in some cases after the deposits had gone through the bank routine and had been received by the verification center in San Francisco.

The only evidence as to who could possibly have deposited these coupons was that of Government witness Theodore Freeman, the Office Manager of the Hollywood Ranch Market. Since Freeman testified that he handled all of the deposits and that either he or other employees under his supervision gathered the stamps, counted them and placed them in sealed envelopes for deposit, and since he further testified that neither of the petitioners had anything to do with the acceptance, collection or deposit of the stamps, it is obvious that the presence of said stamps in the bank deposits cannot in any way be linked with the activities of the petitioners. (*Kotteakos v. United States* (June 10, 1946), 66 S. Ct. 1239.)

The inconsistent position of the trial court in denying the Motion to Strike is highlighted by the following language used by the same trial court in another part of the Record wherein the trial court stated [Tr., Vol. II, pp. 281-282]:

"The Court: Counsel, I feel the evidence is insufficient to tie these defendants into the depositing

of any of the ration coupons. There is nothing to show here they had any contact with those coupons as far as the use is concerned on the depositing of them.

I do not see where there is any evidence against these defendants at all so far as that is concerned. They were all handled by employees and it may arouse a pretty strong suspicion, but I doubt whether there is sufficient evidence here to show that these defendants personally deposited those coupons or had any contact with them.

Their employee was on the stand and he testified they had no contact with them, and that employee was your witness.

Employees of the defendants collected these boxes and counted the stamps and sorted them and deposited them."

See also, Minute Order [Tr., Vol. I, p. 26].

What has been said of the testimony of witnesses Keevey, Welling and Loud is also true of Government Exhibits 1 to 34, inclusive. There was absolutely no connection with the Petitioners.

The presence of said stamps was not inconsistent with the innocence of the Petitioners.

See, also:

*Bihn v. United States*, 66 S. Ct. 1172.

### III.

#### **The Evidence Was Insufficient to Justify the Verdict of Guilty Against Petitioner Gilbert.**

The only evidence in the Record with respect to Gilbert was the testimony of Max Jones and Allen Becker, self-confessed accomplices, who testified for the Government. At best their testimony indicated that they discussed the subject of selling ration currency with Petitioner Gilbert and that he referred them to Petitioner Fredrick. [Tr., Vol. II, pp. 133-143, 155-169.]

Assuming that the witnesses Jones and Becker spoke the truth, the testimony discloses that the only participation by Petitioner Gilbert did not result in a sale or transfer of the documents then offered by Witness Becker, but that at some subsequent time Petitioner Fredrick purchased the documents and that the Petitioner Gilbert was not present nor did he participate in any way.

The court erred in permitting this matter to go to the jury with respect to Petitioner Gilbert and the verdict was contrary to the evidence and to the law.

### IV.

#### **The Information Was Duplicious and the Motion to Dismiss Should Have Been Granted by the Trial Court.**

The crime of acquiring, possessing and controlling counterfeit ration coupons is a different and distinct crime from that of acquiring, possessing and controlling forged ration coupons. Both are denounced by Section 2.5 of General Ration Order No. 8 but do not come within the rule permitting the prosecution to charge crimes in the

conjunctive "and," offenses set forth in the disjunctive "or."

To "forge" means to materially alter a genuine writing by the appending of another's signature or the transferring of a genuine signature to a document for which it was not intended. To "counterfeit" means to imitate in its entirety a document, currency, or other writing. Petitioners are entitled to know whether they are accused of acquiring, possessing and controlling altered ration coupons, or whether they are accused of acquiring, possessing and controlling ration coupons which were imitated in their entirety.

The conjunctive may be used when several acts in the disjunctive are denounced by the statute as criminal, but not where the items of property involved are of different characters.

## V.

### **The Court Erred in Permitting the Same Offense to be Charged in More Than One Count.**

The testimony discloses that the so-called sugar stamps which were the subject of Count Eleven, and the red point stamps, which were the subject of Count Ten, formed a part of the same transaction. [Tr., Vol. II, pp. 166-168.]

Consequently, if there was any offense it was one offense and not two offenses and, therefore, permitting the Government to charge two offenses was contrary to law.

VI.

**The Court Erred in Permitting the Amendment of the Information and in Not Granting the Defendants a Continuance.**

The Government allegedly had charged the Petitioners with the illegal use, acquisition, possession and control of ration "coupons."

Section 1.3 of Revised Ration Order No. 16 provided as follows:

*§1.3 Form in Which Points Are Used.*

(a) There are several forms of ration currency which represent points.

(b) The basic forms of ration currency are the red and green stamps in War Ration Book Four and "tokens" which are designated by the Office of Price Administration to be used for the acquisition of all foods covered by this order. They are the form in which points are generally given up by "consumers."

Section 2.3(d) of Revised Ration Order No. 16 provided as follows:

(d) *A consumer also uses certificates and ration coupons.* Any consumer to whom a "Board" issues a "certificate" or ration coupon may use it to acquire foods covered by the order, just as stamps are used. However, a consumer may give up the certificate or ration coupon at or before the time when the foods are acquired. The number of points a certificate or ration coupon is worth is shown on that certificate or ration coupon. A consumer to whom a certificate has been issued must sign his name on the back before he may use it.

Section 18.1 of 2nd Revised Ration Order No. 3 provides as follows:

(31) "Ration evidences" or "evidences" means certificates, checks, coupons, and stamps.

\* \* \* \* \*

(4) "Certificate" means a sugar purchase certificate (OPA Form R-306) or a food ration certificate (OPA Form R-1201) issued for the delivery of sugar.

\* \* \* \* \*

(17) "Stamp" means a war ration stamp originally contained in a war ration book and designated by the Office of Price Administration as an authorization to take delivery of sugar. All references to stamps 1 to 16, inclusive, are to stamps contained in War Ration Book One.

\* \* \* \* \*

(25) "Check" means a sugar ration check, in the form prescribed by the Office of Price Administration, drawn by a depositor against his account and made payable to the account of a named person.

\* \* \* \* \*

(30) "Coupon" means a "ration coupon" (OPA Form R-330 (Revised), R-342 or R-348).

Thus the term "ration coupon" had a specific and particular meaning distinguishing it from all other ration currency or evidences.

The Petitioners were entitled to rely upon the charge in the Information and to prepare their defense accordingly.

After the Government had introduced all of its witnesses and all of its exhibits, the cross-examination of the last

Government witness by counsel for the Petitioners first disclosed the fact that the Government had failed to prove the charges in the Information.

The Government immediately asked the trial judge to permit the amendment of the Information to insert the word "documents" in place of the word "coupons" [Tr., Vol. II, p. 273], to which counsel for the Petitioners objected on these grounds [Tr., Vol. II, pp. 274-280]:

(1) That Petitioners were caught by surprise and should be afforded an opportunity to prepare a defense to the amended information;

(2) That the amendment constituted a charge of totally new and distinct offenses, and defendants should be arraigned and permitted to plead thereto;

(3) That the amended language made the Information vague, uncertain and ambiguous, and violated the Sixth Amendment to the Constitution of the United States.

The Court, after some expression of doubts, permitted the amendment without giving the Appellants a continuance or in any other way permitting Appellants to prepare a defense to the new charges. [Tr., Vol. II, p. 279.]

The case cited by counsel for the Government, to wit, *Walker v. U. S.*, 7 F. (2d) 309, expressly states that it does not cover a situation where the defendant states he is caught by surprise. The court therein stated:

"Defendant at once pleaded not guilty and did not attempt to say that he was taken by surprise; nor did he ask for a continuance; nor did he suggest or contend that the evidence that had been introduced in support of count one was incompetent or irrelevant in respect to the nuisance charge."

In addition to the foregoing reasons, the term "document" is nowhere defined in any of the ration orders—it could mean anything. If it was contained in the original Information, the Information would have been subject to Demurrer and/or Motion for Bill of Particulars. Permitting its insertion in the Information during the trial does not cure its objectionability. It renders the Information vague, uncertain and does not prevent the Petitioners from being placed in double jeopardy.

## VII.

### **The Trial Court Erred in Its Instructions to the Jury.**

In the case of *Bihn v. United States* (June 10, 1946), 66 S. Ct. 1172, the Supreme Court had under consideration a prosecution for conspiracy to violate statutes and regulations governing the rationing of gasoline. In that case the Appellant was charged with having stolen the coupons in question and the court in giving the charge to the jury used the words "Did she steal them? Who did if she didn't? You are to decide that." In view of the fact that any one of four other persons might have stolen the coupons the Supreme Court held that this instruction was prejudicial error, notwithstanding that general instructions to acquit if there was reasonable doubt as to the guilt of the accused were given, or that guilt might be deduced from the whole record. The court stated (pp. 1174-1175):

"The 'harmless error' statute, Judicial Code, Section 269, 28 U. S. C. A. Sec. 391, means that a criminal appeal should not be turned into a quest for error. It does not mean that portions of the charge are to be read in isolation to the full charge and magnified out of all proportion to their likely importance at the trial.

Boyd v. United States, 271 U. S. 104, 107, 46 S. Ct. 442, 443, 70 L. Ed. 857. Yet as stated in McCandless v. United States, 298 U. S. 342, 347, 348, 56 S. Ct. 764, 766, 80 L. Ed. 1204, 'an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial.' It seems plain that the inflection or tone of voice used in giving the challenged instruction could make it highly damaging. And in any event the probabilities of confusion in the minds of the jurors seem so great, and the charge was so important to the vital issue in the case, that we conclude that prejudicial error was committed. We certainly cannot say from a review of the whole record that lack of prejudice affirmatively appears. While there was sufficient evidence for the jury, the case against petitioner was not open and shut. Since the scales were quite evenly balanced, we feel that the jury might have been influenced by the erroneous charge. Hence we cannot say it was not prejudicial and hence treat it as a minor aberration of trivial consequence. Nor is it enough for us to conclude that guilt may be deduced from the whole record. Such a course would lead to serious intrusions on the historic functions of the jury under our system of government. See Bellenbach v. United States, 327 U. S. ....., 66 S. Ct. 402."

1. *The jury was not instructed as to the law creating the offense.*

(a) The regulations do not create the offense. It is the statute. The trial judge failed completely to advise the jury as to what the statute provided. In the case of *United States v. Levy* (C. C. A. 3rd, 1946), 153 F. (2d) 995, the court held that it is the duty of the trial judge

to instruct the jury as to the pertinent provisions of the Emergency Price Control Act of 1942, as well as the regulations issued thereunder, and whether requested or not, the failure to instruct constitutes reversible error. See, also, *Morris v. United States* (C. C. A. 9th, 1946), 156 F. (2d) 525; *United States v. Pincourt* (C. C. A. 3rd, 1947), 159 F. (2d) 917.

(b) The trial judge at no time advised the jury what the regulations permitted to be done, or what the regulations prohibited.

After reading the substance of the counts in the Information, the court stated there always was in force and effect two ration orders, viz., General Ration Order No. 8 and Revised Ration Order No. 16. Nothing was said about Revised Ration Order No. 3. [Tr., Vol. II., p. 374.] The court in no place advised the jury what acts were permitted.

2. *The following instruction is obviously erroneous:*

"The Court: That is your problem, ladies and gentlemen. As I stated before, if there is any reasonable doubt as to the guilt of either defendant or both of them, he or they should be given the benefit of that doubt. On the other hand, if you believe that either defendant or both of them *committed any offense* or in any manner aided or abetted in the commission of the offense and you believe that beyond a reasonable doubt, then he or they should be convicted. That is all I can say to you." [Tr., Vol. II, pp. 392-393.] (Emphasis ours.)

This instruction, coming as it did after the jury had once retired and then returned and told the court that its members were confused, constitutes reversible error. The

judge erroneously told the jury that if it found the Appellants guilty of "any offense," they were to be found guilty of the offenses charged. It is little wonder that the jury debated less than a half hour after receiving this instruction. But it is difficult to understand of what crime the defendants were convicted.

3. *The following instruction is erroneous in that it is ambiguous, confusing and meaningless:*

"Count 11 I have previously told you, concerns itself with sugar. The defendants are charged with willfully and unlawfully acquiring, possessing and controlling sugar ration documents, which ration documents were acquired, possessed, and controlled by the defendant personally, or as an agent for another in accordance with the current ration orders." [Tr., Vol. II, p. 378.]

4. *The following instruction is erroneous:*

"The ration order in any and all other ration orders promulgated pursuant to the Second War Powers Act of 1942, does not provide for the sale of sugar ration documents for a monetary consideration, or for a transfer for the purpose of obtaining a monetary consideration." [Tr., Vol. II, p. 378.]

The mere fact that the regulation does not provide for something, does not mean that it is prohibited or a violation of the law.

5. *The following instruction is erroneous:*

"If you should find beyond a reasonable doubt that the defendants or either of them, on or about May 28, 1945, in the City of Los Angeles, willfully and unlawfully acquired, possessed or controlled ap-

proximately 3,503 ration documents purporting to represent stamp 36 of War Ration Book No. IV, and purporting to be valid for five pounds of sugar for the month of May, 1945, without the transfer thereof at any time of sugar, you are to find the defendants guilty as charged in Count 11." [Tr., Vol. II, pp. 378-379.]

The regulation does not prohibit a purchase.

6. *The following instruction is erroneous:*

"The circumstances relied upon must point so unerringly to the guilt of the accused as to exclude every other reasonable hypothesis and must be such as to exclude every reasonable doubt of the guilt of the defendants, and, if it does not do so, or if you believe the circumstances to be as consistent with innocence as with guilt, it is your duty, and you must, acquit the defendants." [Tr., Vol. II, p. 382.]

This instruction is contrary to law. In the case of *Paddock v. United States* (C. C. A. 9th), 79 F. (2d) 872, 875, 876, this court stated:

"These instructions were erroneous. The rule with reference to the consideration of circumstantial evidence by the jury is thoroughly settled. This rule in brief is that the circumstances shown must not only be consistent with guilt, but inconsistent with every reasonable hypothesis of innocence. 2 Brickwood Sackett Instructions to Juries, Sec. 2491, *et seq.* We have said that this well-settled instruction in regard to the degree of proof required where circumstantial evidence is relied upon is merely another statement of the doctrine of reasonable doubt as applied to circumstantial evidence. It may therefore be true that 'no greater degree of certainty is

required when circumstantial evidence is relied upon than where direct evidence is relied upon,' as stated by the trial judge. The additional statement in the instruction that 'evidence about circumstances . . . must at all times be consistent with guilt only and inconsistent with innocence,' omits the qualifying and important phrase, 'inconsistent with every reasonable hypothesis of innocence,' and for that reason is an erroneous statement of the law."

7. *The following instruction is erroneous and contrary to the law:*

"Both Ration Orders make it unlawful for any person to willfully acquire, use, permit the use of, transfer, possess or control ration documents representing ration points in various denominations, except the person or the agent of the person to whom such ration documents were issued by the War Price and Rationing Board, or by whom they were acquired in accordance with a Ration Order. Both Orders make it unlawful to use or transfer a ration document, except in accordance with the provisions thereof." [Rep. Tr. of Proc., pp. 374-375.]

8. *The following instruction is erroneous:*

"No law or Ration Order provides for the issuance of counterfeit ration documents of any type to anyone. It may be presumed that counterfeit documents were never issued to any person or the agent of any person by any War Price and Rationing Board, and were never acquired in accordance with any Ration Order." [Tr., Vol. II, p. 376.]

This is an incorrect presumption. Counterfeit documents can be acquired lawfully in the same manner that counterfeit money can be acquired lawfully.

9. *The instructions on pages 377-378 of the Reporter's Transcript of Proceedings are contrary to Morris v. United States (C. C. A. 9th, 1946), 156 F. (2d) 525.*

10. *The following instruction is erroneous:*

"The ration order which covered sugar at the time of this transaction, was 2nd Revised Ration Order No. 3, which provides that ration documents for sugar are to be transferred only in exchange for sugar. There are exceptions with which you are not concerned in this case." [Tr., Vol. II, p. 378.]

While it is true that no exception was taken to these instructions at the time they were given, Appellate Courts will on their own motion notice instructions which are so erroneous as to constitute a denial of justice. *Morris v. United States (C. C. A. 9th, 1946), 156 F. (2d) 525.*

11. *The following instruction is erroneous:*

"The Court: \* \* \*

While I have not commented on the evidence, there is just one question before the jury as I said, a question of fact—the approximately 260,000 points, did they come from an unlawful acquisition or did they receive them in accordance with, you might say, the testimony of the defendants, or was there an unlawful acquisition?

Mr. Gottfried: Exception.

The Court: Any further exceptions?

Mr. Gottfried: That is all, your Honor.

The Court: The bailiffs will be sworn.

Just a moment. You said 'exception.' What was the last exception to?

Mr. Gottfried: I thought your Honor had given a contrary instruction to the one I had requested.

I did not understand your Honor was commenting on the evidence at the time.

The Court: I am not commenting on the evidence. I am trying to point out to the jury that while the instructions may seem long and complicated, after all, it is just a question of whether or not the Government has proved beyond a reasonable doubt as to the acquisition of the stamps. The only evidence here as to the acquisition is the purchase of 260,000 stamps or points. That is the only evidence that has been introduced, direct evidence. The other evidence was introduced solely to show that there were certain counterfeit coupons in their bank account." [Tr., Vol. II, pp. 390-391.]

It is respectfully submitted that this erroneous instruction, in view of the evidence, prejudiced the jury in that the Government had totally failed to prove that the Petitioners or either of them had anything to do with the bank deposits, but on the contrary had proven affirmatively that neither of them had anything to do with the bank deposits.

12. The court's instructions with reference to Section 332 of the Criminal Code on principals [Tr., Vol. II, pp. 380-381] were apparently designed to cover Petitioner Gilbert, but in view of the evidence that Gilbert did not directly commit any of the acts charged, nor aid, abet, counsel, command, induce or procure their commissions, this instruction merely served to confuse the jury and to prejudice it. Reliance is particularly had in the case of *Morei v. United States* (C. C. A. 6th), 127 F. (2d) 827-831.

**Conclusion.**

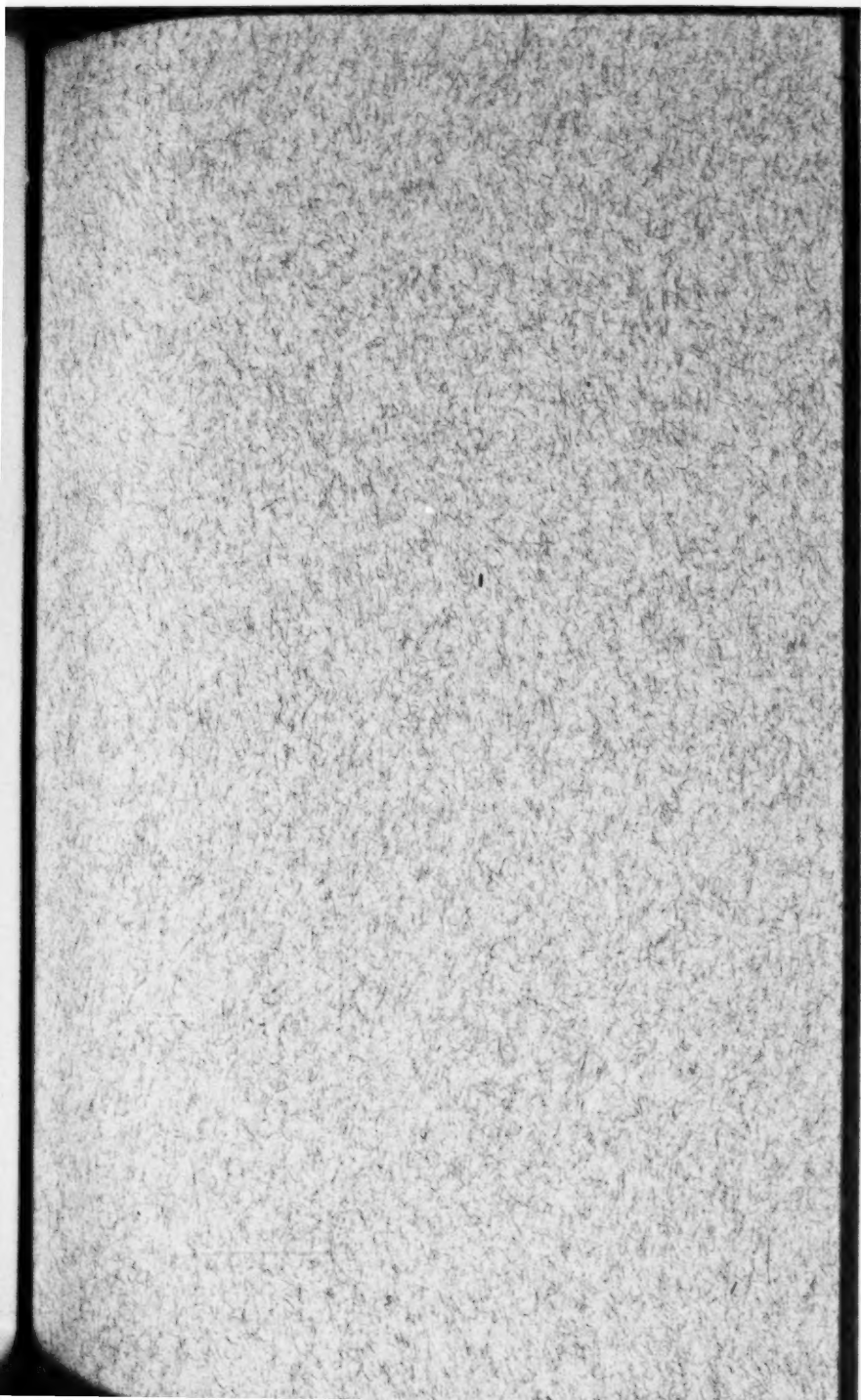
For the foregoing reasons petitioners submit that a writ of certiorari directed to the Ninth Circuit Court of Appeals should be granted.

Dated: Los Angeles, California, August 14, 1947.

Respectfully submitted,

ABRAHAM GOTTFRIED,

*Attorney for Petitioners.*



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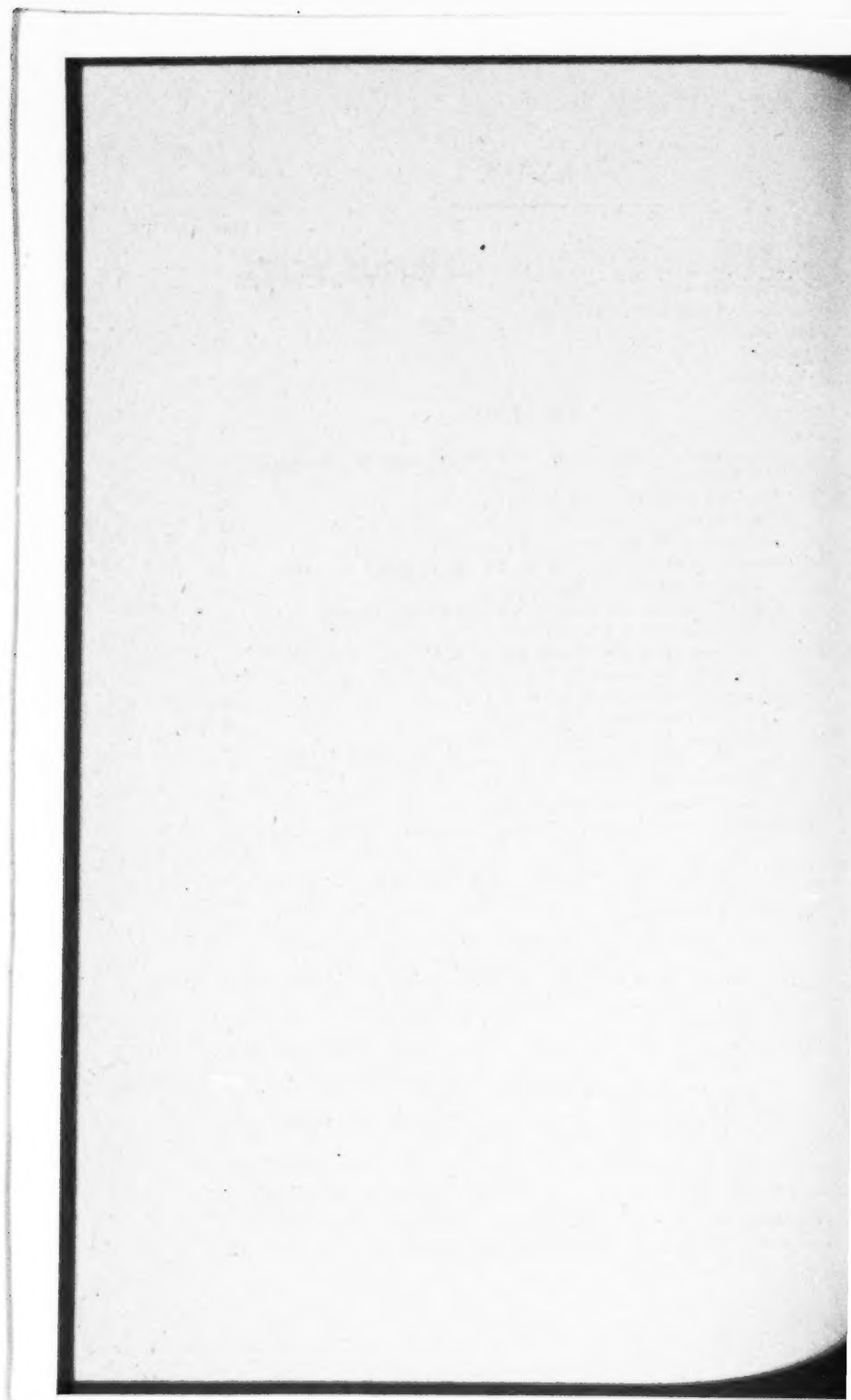
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# In the Supreme Court of the United States

OCTOBER TERM, 1947

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No. 276

WILLIAM H. FREDRICK AND NATHAN GILBERT,  
PETITIONERS

v.

UNITED STATES OF AMERICA

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE NINTH  
CIRCUIT

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

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## OPINION BELOW

The opinion of the circuit court of appeals (R. 399-423) <sup>1</sup> has not yet been reported.

## JURISDICTION

The judgment of the circuit court of appeals was entered July 18, 1947 (R. 424). The petition for a writ of certiorari was filed August 18, 1947. The jurisdiction of this Court is invoked

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<sup>1</sup> The record is in three volumes. The designation "R." is used herein to refer collectively to volumes 2 and 3, the pagination of which is consecutive. References to volume 1, where necessary, are indicated by the designation "1 R."

under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

#### QUESTIONS PRESENTED

1. Whether an allegation that unlawfully acquired counterfeit ration stamps "purported to be valid" for a certain month was surplusage.

2. Whether proof that shortly following unlawful purchases of meat and sugar ration stamps by the operators of a meat market large quantities of counterfeit ration stamps of those categories were deposited in the market's bank account by an employee of the market was admissible as further evidence of the unlawful purchases and to prove the counterfeit nature of the stamps purchased.

3. Whether the evidence is sufficient to sustain petitioner Gilbert's conviction of unlawfully acquiring counterfeit ration stamps.

4. Whether the information was duplicitous because it charged the acquisition of counterfeit and forged ration stamps, the stamps in question being counterfeit, not forged.

5. Whether it was within the trial court's discretion to grant the Government's motion, made near the close of the Government's case, to amend the information by substituting the words "ration documents" for "ration coupons," thereby correcting a technical misdescription of the documents involved.

6. Whether the trial court erred in its instructions to the jury.

**STATUTE AND REGULATIONS INVOLVED**

The Act of June 28, 1940, c. 440, 54 Stat. 676, as amended by the Act of May 31, 1941, c. 157, 55 Stat. 236, and by Title III of the Second War Powers Act of March 27, 1942, c. 199, 56 Stat. 177 (50 U. S. C. App., Supp. V, 633, 1152), provides in pertinent part:

SEC. 2 (a) (2). \* \* \* Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.

\* \* \* \* \*

SEC. 2 (a) (5). Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than \$10,000 or imprisoned for not more than one year, or both.

\* \* \* \* \*

SEC. 2 (a) (8). The President may exercise any power, authority, or discretion conferred on him by this subsection (a), through such department, agency, or officer of the Government as he may direct and in conformity with any rules or regulations which he may prescribe.

Sections 2.5 and 2.6 of General Ration Order No. 8, as amended (8 F. R. 3783; 8 F. R. 9626; 9 F. R. 1325; 9 F. R. 2746), provided in pertinent part during May 1945, when the offenses charged were allegedly committed:

SECTION 2.5. *Acquisition, use, transfer or possession of counterfeited or forged ration document.*—(a) No person shall acquire, use, permit the use of, transfer, possess or control any counterfeited or forged ration document under circumstances which would be in violation of section 2.6 if the document were genuine or if he knows or has reason to believe that it is counterfeited or forged.

SECTION 2.6. *Acquisition, use, transfer, or possession of ration document.*—No person shall acquire, use, permit the use of, possess or control a ration document except the person, or the agent of the person, to whom such ration document was issued, or by whom it was acquired in accordance with a ration order or except as otherwise provided by a ration order. \* \* \*

## STATEMENT

On January 22, 1946, an information in eleven counts (1 R. 2-18) was filed in the District Court for the Southern District of California charging petitioners with violations of Section 2 (a) (5) of the Act of June 28, 1940, as amended (*supra*, p. 3) and Sections 2.5 and 2.6 of General Ration Order No. 8 (*supra*, p. 4). The first eight counts were dismissed with the consent of the Government at the close of its case (R. 285) and need not be considered. Counts 9 and 10 charged that in May 1945 petitioners acquired, possessed, and controlled specified quantities of "counterfeit and forged" meat ration "coupons"<sup>2</sup> "purporting to be valid for the month of May, 1945" and that petitioners were not persons or agents of persons to whom the coupons were issued or by whom they were acquired in accordance with any ration order, the coupons having been acquired not in connection with any transfers of food, but by purchase. Count 11 charged a like offense involving sugar ration coupons. Following a jury trial, petitioners were found

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<sup>2</sup> On motion of the Government, made just prior to the close of its case, the information was amended by the substitution of the word "documents" for "coupons" in counts 9, 10, and 11 (R. 273, 294). This amendment is the subject of one of the contentions of the petition for certiorari (*infra*, pp. 12-13).

guilty on all three of these remaining counts (1 R. 31). Petitioner Fredrick was sentenced to six months' imprisonment on each count, the terms to run concurrently, and fined \$2,500 on each of counts 9 and 11. Petitioner Gilbert was sentenced to 90 days' imprisonment on each count, the terms to run concurrently, and fined \$1,250 on each of counts 9 and 11. Execution of both sentences of imprisonment was suspended and petitioners were placed on probation for two years. (1 R. 36-39.) On appeal, the judgments of conviction were affirmed (R. 424).

The evidence adduced by the Government may be summarized as follows:

Petitioners are partners who operate two meat and grocery markets known as Hollywood Ranch Market and Bill's Ranch Market, located in Hollywood and Burbank, California, respectively (R. 302). Around the first week in April 1945, petitioner Gilbert inquired of one Max Jones if he knew where Gilbert "could get meat stamps." Jones replied that he "didn't know at the present time" but that he "would find out." Gilbert told Jones that he "could use some" if Jones "could get some." (R. 134-135.)

Several days later Jones introduced one Al Becker to Gilbert and told Gilbert that Becker "might be able to locate some ration points for him" (R. 136-137, 157). Jones asked Gilbert how many "points" he needed and Gilbert re-

plied, "Approximately 100,000." Becker told Gilbert that he would try to get them for him. (R. 157-158.) Thereafter, having learned of a source of "red points," Becker telephoned Gilbert to inquire if he "still wanted his points" and Gilbert advised that he did (R. 187-188).

A week or two later, Becker took a "package of [100,000] points" to Gilbert at Bill's Ranch Market, but Gilbert directed Becker to go to the Hollywood Ranch Market and "ask for Bill Fredrick" (R. 158-159, 194). Becker then went to the Hollywood Market, showed petitioner Fredrick a number of envelopes, and told him that "those were the points that he wanted." After examining the stamps contained in several of the envelopes, Fredrick said that he "didn't know \* \* \* whether they were good or bad or what they were," and expressed a desire to "check" them. Accordingly, Becker left with Fredrick as samples a number of the stamps, which were "red points". (R. 159-161, 166.)

Several weeks later, following several telephone conversations in which Fredrick told Becker that he was still "checking" the stamps (R. 161), Becker again visited Fredrick. This time Fredrick purchased 6,000 meat ration stamps, representing 60,000 points, for \$600 (R. 162-164, 166). A few weeks later Fredrick purchased from Becker approximately 20,000 additional meat ration stamps, representing 200,000 points, and an

"envelope of sugar stamps," all for approximately \$2,000 (R. 164-167).

A month or six weeks following Becker's introduction to petitioner Gilbert by Jones, Gilbert complained to Jones that "the stamps that they had gotten from Becker \* \* \* had turned out to be counterfeits" (R. 137-138).

Alma Keevy, a clerk in the O. P. A. verification center in San Francisco (R. 40-41), testified that some 8,000 out of 14,000 meat ration stamps (Gov. Exs. 1-18, R. 29-31, 90) and 3,500 out of 3,800 sugar ration stamps (Gov. Exs. 21-28, R. 59, 92) deposited by the Hollywood Ranch Market in the Hollywood State Bank in May 1945 (R. 27-38, 59-60, 87-88, 91-92) were counterfeit (R. 58, 62).

Thaddeus Loud, an agent of the O. P. A. Currency Protection Branch (R. 230), testified that some 25,000 out of 41,000 additional meat ration stamps (Gov. Ex. 34, R. 95, 250) deposited by the same market in the same bank later in May 1945 (R. 99, 234, 243) were also counterfeit (R. 243).

#### ARGUMENT

1. Petitioners contend that the Government's proof of the charges contained in counts 9 and 10 was defective because it was not established that the meat-ration stamps involved in those counts "purported to be valid for the month of May 1945," as alleged (Pet. 3, 5, 18-19). However, this allegation of the two counts was sur-

plusage in describing the stamps involved. The Government was required to establish only the essential elements of the offenses, *viz.*, that petitioners acquired counterfeit ration documents, not being persons or the agents of persons to whom the documents were issued or by whom they were acquired in accordance with a ration order (Section 2.5 and 2.6 of General Ration Order No. 8, *supra*, p. 4). Cf. *Randall v. United States*, 148 F. 2d 234, 235 (C. C. A. 5), certiorari denied, 325 U. S. 885; *United States v. Cox*, 147 F. 2d 587, 588-589 (C. C. A. 7), certiorari denied, 325 U. S. 858. Nonessential allegations of an indictment or information, i. e., surplusage, need not be proved. *Jones v. United States*, 72 F. 2d 873 (C. C. A. 7); *Funk v. United States*, 66 F. 2d 70 (C. C. A. 4), reversed on other grounds, 290 U. S. 371; *Stine v. United States*, 32 F. 2d 742, 743-744 (C. C. A. 8); *Van Dam v. United States*, 23 F. 2d 235, 238 (C. C. A. 6); *Friedman v. United States*, 276 Fed. 792, 795-796 (C. C. A. 2); *Grand Trunk Ry. Co. v. United States*, 229 Fed. 116, 119 (C. C. A. 7), certiorari denied, 241 U. S. 681.<sup>3</sup>

<sup>3</sup> The trial court, it is true, charged the jury that the prosecution was required to prove beyond a reasonable doubt that the stamps involved in counts 9 and 10 purported to be valid for the month of May 1945 (R. 379), but this instruction was, in consequence of the rule stated in the text, more favorable to petitioners than was required. In any event, the counterfeit meat-ration stamps found in petitioners' bank account, which were deposited in May 1945 (see *supra*,

2. Petitioners contend (Pet. 3-4, 5, 20-22) that it was error for the trial court to refuse to strike the testimony and exhibits introduced by the Government to show that vast quantities of counterfeit meat and sugar ration stamps were deposited by the Hollywood Ranch Market in the Hollywood State Bank in May 1945 (*supra*, p. 8). The basis of this contention is that the evidence showed that these deposits were made, not by petitioners or either of them, but by one Freeman, the office manager of the Hollywood Ranch Market (Pet. 21). Petitioners' argument is clearly without merit. Freeman was in the employ of petitioners, who operated the Hollywood Ranch Market as partners. The evidence that shortly following the unlawful purchases of meat and sugar ration stamps by petitioners from Becker large quantities of counterfeit stamps of those categories turned up in petitioners' bank account was manifestly relevant, not only to support Becker's testimony as to the sales, but also to show that the stamps so purchased were counterfeit. Cf. R. 247-248.

3. Petitioner Gilbert contends that the evidence is insufficient to sustain the verdict as to him because he was not shown to have participated

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p. 8), were in evidence (Gov. Exs. 1-18, R. 29-31, 90; Gov. Ex. 34, R. 95, 250), and the O. P. A. order validating their genuine counterparts for the month of May 1945 was published at 10 F. R. 4715, thus providing a basis for judicial notice of the fact of their validation for that month.

in the actual purchases (Pet. 4, 5, 23). The Government proved, however, that it was Gilbert who first broached with the witness Jones the matter of illicitly procuring ration stamps, that it was Gilbert to whom Jones introduced Becker as a man who might be able to help him, that it was Gilbert who estimated to Becker the number of stamps desired as "Approximately 100,000," and that it was Gilbert who told Becker that he "still wanted his points" when Becker called to tell him he had located some stamps. When Becker brought the stamps thus requested, moreover, Gilbert referred Becker to his partner, Fredrick, who completed the negotiations initiated by Gilbert by making the actual purchases. Finally, Gilbert complained to Jones, following the discovery of the scheme by the authorities, that the stamps "had turned out to be counterfeits." (*Supra*, pp. 6-8.) It would be difficult to imagine a clearer case of aiding and abetting, not to mention procuring, the commission of an offense (Section 332 of the Criminal Code, 18 U. S. C. 550).

4. Petitioners contend that the counts involved should have been dismissed as duplicitous because they charged the acquisition of counterfeit *and* forged ration documents, whereas the documents were in fact counterfeit, and not forged (Pet. 4, 5-6, 23-24). The contention is without merit, since it was proper to allege in the conjunctive both of the characteristics of such documents

specified in the ration order in the disjunctive. See *Crain v. United States*, 162 U. S. 625, 636; *Pines v. United States*, 123 F. 2d 825, 828-829 (C. C. A. 8).

5. Petitioners contend (Pet. 4, 6, 25-28) that the trial court erred in granting the Government's motion, made just prior to the close of the Government's case, to amend the information by substituting the word "documents" for "coupons" in counts 9, 10, and 11 (see note 2, *supra*, p. 5). It is well settled, however, that an information, being drawn by the United States Attorney and not founded on the oath of a grand jury, may be amended by leave of court at any time before verdict if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced. *Armstrong v. United States*, 16 F. 2d 62, 64 (C. C. A. 9), certiorari denied, 273 U. S. 766; *Walker v. United States*, 7 F. 2d 309, 311 (C. C. A. 9); *Muncy v. United States*, 289 Fed. 780, 781 (C. C. A. 4); Rule 7 (e), F. R. Crim. P.\*; cf. *Ex parte Bain*, 121 U. S. 1, 6. The occasion for the amendment in this case was the fact that, as elicited on cross-examination of government witness Loud (R. 268-273), the documents involved were, technically

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\* The Federal Rules of Criminal Procedure took effect on March 21, 1946, following the trial in the instant case. The Advisory Committee's note to Rule 7 (e) points out, however, that "This rule continues the existing law that, unlike an indictment, an information may be amended."

speaking, ration stamps rather than ration coupons. The amendment accordingly substituted the generic word "documents" for "coupons." There was at no time during the trial any question as to the nature of the ration documents involved in this case. As the court below pointed out (R. 415), it was clearly within the discretion of the trial court to permit the purely technical misdescription of the stamps as "coupons" to be corrected.<sup>3</sup>

6. Petitioners finally contend that the trial court erred in its instructions to the jury in twelve specified respects (Pet. 28-35). Petitioners took no exception, however, to any of these instructions (see Pet. 34) except the one which they discuss under their point 11 (Pet. 34-35). In respect of this instruction, it was not clear to the court, nor is it clear to us, to what petitioners' counsel was excepting. In any event, this instruction and the others criticized by petitioners seem to us to be so clearly correct as not to justify discussion of them here, except in respect of the instruction discussed by petitioners under their point 2 (Pet. 30-31). That instruction, in pertinent part, was as follows: "\* \* \* if you believe that either defendant \* \* \* committed any offense

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<sup>3</sup> Contrary to petitioners' assertion that "the term 'document' is nowhere defined in any of the ration orders—it could mean anything" (Pet. 28), Section 1.2 of General Ration Order No. 8, defined "ration document" to mean "\* \* \* stamp, \* \* \* coupon, \* \* \*" (8 F. R. 3783).

or \* \* \* aided or abetted in the commission of the offense \* \* \*, then he \* \* \* should be convicted. \* \* \*” (R. 393). Petitioners criticize this instruction on the ground that it permitted the jury to convict if they found that petitioners committed *any* offense, whether charged in the information or not. When this instruction is considered in the context of the instruction as a whole, however, there was no possibility that the jury might have entertained any such misapprehension as petitioners now suggest. The instruction now criticized was given to the jury when, after having retired to consider their verdict, they returned to the courtroom and asked for additional instructions on a matter of fact concerning counts 9 and 10 (R. 391-392). The court stated that questions of fact were for the jury to decide and then reiterated some of his earlier general instructions (R. 392-393). Previously, in the course of his main instructions, given before submission of the case to the jury, the trial judge had made it entirely clear to them that in order to convict petitioners on any of the three counts submitted to them, they were required to find petitioners guilty of the precise offense charged in that count (R. 372-374, 377-380). Manifestly, therefore, the judge’s reference to “any offense” in the above quoted supplementary instruction now complained of meant any of the offenses charged in the three counts submitted to the jury; this refer-

ence could not possibly have had the effect, now suggested by petitioners, of misleading the jury as to the nature of their function.\*

#### CONCLUSION

The petition for a writ of certiorari presents no question warranting further review by this Court. We therefore respectfully submit that it should be denied.

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SEPTEMBER 1947.

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\* Petitioners also contend that counts 10 and 11, alleging acquisitions of meat and sugar ration stamps, respectively, charged but one offense because these stamps were purchased in a single transaction (Pet. 4, 6, 24). The suspended imprisonment sentences of both petitioners on all three counts were made to run concurrently, however, and fines were not imposed on count 10 (*supra*, p. 6). Consequently, it is unnecessary to consider the merits of this contention. *Pinkerton v. United States*, 328 U. S. 640, 641-642, note 1; *Hirabayashi v. United States*, 320 U. S. 81, 85, 105.